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Committee on Political Affairs and Democracy

Corruption as governance regime: a barrier to institutional efficiency and progress

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Information note

Fact-finding visit to Ukraine from 19 to 20 January 2016: the first case study

¹ Document declassified by the Committee at its meeting in Paris, on 8 March 2016.

1. Introduction

1. In choosing Ukraine, as the first case study for developing my report, I have privileged its rich historical past which it shares with its neighbours in the region as well as the current context marked by important and radical efforts to fight corruption. Clear and tangible steps to address corruption have become one of the main demands of the Euromaidan and its aftermath.

2. What follows is a brief analysis of the information I gathered prior to and during my visit to Ukraine from 19 to 20 January 2016. The programme of my visit appears in Appendix.

3. To start with, some preliminary figures for Ukraine reveal that:

- the control of corruption measurement by the World Bank World Governance Indicators has remained almost unchanged in the last five years (2010-2014) with only 17% of world countries doing worse than Ukraine;
- Transparency International's Corruption Perceptions Index 2015: Ukraine is ranked 130th out of 167 States;
- despite envisaged sanctions for corruption offences, in 2013 only 3 public servants, as a result of investigations, were deprived of the right to occupy civil service positions according to an official Ministry of Justice report;
- despite criticism of high-level corruption cases, I was told that citizens regularly bribe state officials to "accelerate" inefficient public services and rarely see the damaging effect of petty corruption in nurturing an overall culture of bad governance and impunity;
- PACT Uniter survey² also points out that over a half of citizens experienced corruption; moreover one third of the population believes that corruption today is more prevalent than prior to Euromaidan.

2. Historical background

2.1. *The period under the Russian Empire (19th – the early 20th century)*

4. In 1830, when most of current Ukraine's territory was part of the Russian Empire, one of the printing houses in Saint Petersburg published a book *The art of taking bribes*. In this book, the author set out, in a satirical manner, a classification of bribes – gifts or meals, money, reciprocal favours – and provided advice on how a civil servant could extract a bribe from the user. This reflected society's awareness about how corruption, in particular bribery, penetrated a strong State bureaucracy on which, together with the army, the public authority, represented by the monarch, was based. Some legislation aimed at better detection and deterrence of corruption was adopted in the course of the 19th century.³ A special commission of the Senate, set up in 1862 to investigate the causes of the bribery of civil servants, found that corruption was due to inappropriate legislation, low salaries and the lack of the deterrent effect of penalties. In addition, the lack of independence of the justice, the strong hierarchical subordination within the State administration, the weak qualification of civil servants and the lack of openness in public affairs were also mentioned.⁴

2.2. *The Soviet period*

5. The Russian revolutions were followed by the setting up of the Union of Soviet Republics, some of which might have originally had different cultural and historical relations with public authorities. A harmonisation took place through the setting of a new government machinery composed of the State apparatus (a pool of positions of political or bureaucratic responsibility in local and central bodies) and the *Nomenklatura* (high ranking party management). This structure apparatus remained the State's bedrock until the end of the Soviet period.

6. The first interesting observation related to this period is that the term "corruption" was not used until the 1980s. Such an offence did not exist in relevant criminal codes of Soviet Republics, including Ukraine. Instead the terms "bribe" and "misuse of official position" were used, leaving the manifestation of favouritism and nepotism outside the scope of reprimanded behaviour. Later some offences were also added to criminal codes to tackle the "shadow" market which had started developing as from the 1970's to meet the growing number of citizens' consumption requirements. This approach jeopardised and narrowed the understanding of corruption during the Soviet period. In addition, the official position to consider bribes as typical of an

² http://uniter.org.ua/upload/files/PDF_files/Anticorr-survey-2015/CorruptionFULL_2015_Eng_for%20public.pdf.

³ History of fight against corruption in Russia, A.I Mizeriy, Publication of the Niznniy Novgorod University, 2001, p. 182.

⁴ Idem.

exploitative State did not enable classification as corruption of some actions by the new State apparatus.⁵ Still several bribery cases were reported, especially in the late Soviet period.⁶

7. The planned economy, state-owned enterprises with productivity objectives set in advance, fixed prices, the limited possibilities to acquire personal belongings and property as well as advantages attributed to elites in an official way reduced the volume of corruption transactions though it accentuated growing social and economic discrepancies.

8. However, even though the Soviet Union system had allowed little room for goods or services to be redistributed beyond official channels and procedures, the planned economy was reported as being an incentive for distorted practices. At the time, political objectives prevailed over economic realities. To meet these, sometimes realistic, objectives or, alternatively, to falsify figures to maintain a successful appearance, the State needed to count on a strong apparatus of executives, ranging from local managers to officials in the capital cities, each of whom was bribing his own hierarchical superior, maintaining in this way a "bleu code".⁷ An example of such an organisation is provided in the famous "Cotton Mafia case" investigated in the 1980's. Though this case concerned the Republic of Uzbekistan, the same system was more or less present in other Soviet Republics.

2.3. *Fight against corruption and State-building in post-Soviet and modern Ukraine*

9. Post-communist, like post-Soviet, does not refer merely to a historical sequence, but rather to the fact that the conditions preceding the democratic transition have a decisive role in the formation of the system.⁸ Some authors claimed that, regardless of the monolithic appearance of the Soviet State, ultimate power and authority resided with the party rather than the State. Therefore, when the party collapsed there was "little of the latter to take its place".⁹

10. Following the fall of the Soviet Union, elections took place in Ukraine, which brought to power, as was the case in some other post-communist countries, some former party elites used to a special inner structure and operation mode of the system.¹⁰ In addition to inheriting the operation and the decision-making structure, the former elite were able to acquire economic weight through a large scale privatisation. At the same time, corruption penetrated all levels of such public institutions such as the civil service, the custom and the tax services.

11. In this period, corruption started appearing as a major indicator of the weakness of the State. Basic State institutions started losing their autonomy vis-à-vis competing elites shaping policy making, regulatory and legal environment and they also saw their policy implementation power reduced.¹¹ In the wake of Euromaidan, distribution of positions in public institutions became an open form of commerce.

12. What was the impact of this new reality on forms of corruption? First of all, new forms of corruption, which were not regulated by criminal law, appeared such as misuse of public office for personal gain, misuse of public budget or the trading in influence and many others. Accordingly, Ukraine started, under the pressure of international institutions, to elaborate appropriate legal tools to counter these actions. However, even several years afterwards, these tools are still not appropriate given that there was no clear understanding of the distinction between corruption and various kinds of bribery, embezzlement and misuse of the State budget.¹² Moreover, corruption continues to be qualified as such mostly when it concerns the

⁵ Letter of the Central Committee of the Communist Party of 29 March 1962 on "Reinforcing of fight against bribe and plundering of public good", idem.

⁶ An internal note to the Central Party Committee of 1981 referred to 6000 cases of bribes which represented 50 % increase comparing to 1975, as well as to cases of the organised crime within controlling bodies, ministries, regional prosecutor' offices and courts, idem.

⁷ According to Mr Gorbachev's Prime Minister Nikolai Ryzhkov, the "moral state of the society" in 1985 was its "most terrifying" feature: "[We] stole from ourselves, took and gave bribes, lied in the reports, in newspapers, from high podiums, wallowed in our lies, hung medals on one another. And all of this — from top to bottom and from bottom to top." Nikolai Ryzhkov, *Perestroika: Istoriya predatel'stv [Perestroika: The History of Betrayals]* (Moscow: Novosti, 1992), 33, 94.

⁸ « Pre-Modern State-Building in Post-Soviet Russia », Ottorino Capelli, *Journal of Communist Studies and Transition Politics*, Vol. 24, No. 4 December 2008.

⁹ Idem.

¹⁰ Idem.

¹¹ Idem.

¹² « Political corruption: definition, manifestations, mechanisms and resources », Y.A. Nisevich, High school of economics, Moscow.

misuse of State money and is performed by natural persons.¹³ The concept of criminal liability for corruption offences of legal persons raised great concerns as the introduction of such liability would require the resetting of the whole system of detection and investigation which is currently directed only against natural persons.

13. Secondly, as “it was a case of many transition economies, corruption took on a new image - that of so-called oligarchs manipulating policy formation”.¹⁴ It has received the name of the “State capture”. “While most types of corruption are directed toward changing how existing laws, rules, or regulations are implemented with respect to the bribe payer, State capture refers to corrupt efforts to influence how those laws, rules, and regulations are formed. Bribes to parliamentarians to “buy” their votes on important pieces of legislation, bribes to government officials to enact favourable regulations or decrees, bribes to judges to influence court decisions - these are the classic examples of grand corruption through which firms can encode advantages for themselves into the basic legal and regulatory structure of the economy.”¹⁵

3. The current situation

14. Clear and tangible steps to address corruption have become one of the main demands of the Euromaidan and its aftermath. In the aftermath of Euromaidan, after uneasy negotiations that follow each introduction of anticorruption draft laws into the Parliament, the legislators (the previous legislature) adopted a comprehensive anti-corruption package in October 2014, and voted through important legal instruments in 2015.

15. Furthermore, conditionality set forth by European cooperation (including the 2014 EU Association Agreement) and funds coming from the IMF (establishment of an Anti-Corruption Bureau) and the World Bank (establishment of a preventive anticorruption body) have played a pivotal role. Currently, the Visa Liberalisation Action Plan (VLAP) is used to persuade all branches to show true progress in fighting corruption.

16. The new anti-corruption system has been set up which is composed of various bodies based on different appointment procedures and under the supervision of different authorities. The initial proposal to follow the Hong Kong example (uniting under one roof and one authority departments dealing with detection, investigation, prosecution and prevention of corruption offences of high level officials and breaches of the legislation on political party funding) has not been chosen.

17. Thus, the Parliamentary Committee on Combatting Organised Crime and Corruption continues to be the legislative focal point and clearing house for anti-corruption risk assessment of draft legislation initiated within Parliament. The Ministry of Justice will retain the function of conducting routine anti-corruption risk assessments of draft legislation initiated by the executive branch. The National Anti-Corruption Bureau (NABU) is in charge with detection and investigation of corruption. The entity is to have up to 200 higher-level officers and up to 500 investigators, and is to run through 7 regional offices of the country. Its task is to counter criminal corruption offences and untruthful asset declaration by senior officials, judges, members of the Parliament and the Government. The NABU Director was elected in April 2015 and currently the staff is being recruited. Civic oversight board is also proactive and very involved. Currently the minimum necessary staffing of NABU is in place but proactive recruitment is also ongoing. The Specialised Anti-Corruption Prosecution Office (SAPO) will control over the pre-trial investigation procedure by the NABU and the support of the accusation before the court. The leadership of the institution is in place and recruitment of all staff (close to 50) should be completed, with probability, until the end of January 2016. The National Agency for Corruption Prevention (NAPC) will be with policy design, verification of assets declarations, control over the funding of political parties, anti-corruption expertise and protection of whistle-blowers. Three members of the NAPC were appointed in 2015. The competition for four other positions is ongoing. The Asset Recovery Agency will be, unless the legislation is changed, storing arrested assets, managing them through the representatives selected on the competitive basis, cooperating with foreign countries, and partaking in representing the interests of Ukraine in foreign courts. The National Council for Anti-Corruption Policy has been also established comprising over 20 members of Civil Society Organisations, executive branch representatives, representatives of businesses and academia. The body, while seemingly having the

¹³ Since the responsibility of legal persons for corruption offences has been established two years ago no single case against a legal entity has been launched.

¹⁴ “Confronting the Challenge of State Capture in Transition Economies” by Joel Hellman and Daniel Kaufmann, Finance and Development, IMF magazine, Vol. 38, No. 3 (2001).

¹⁵ “Confronting the Challenge of State Capture in Transition Economies” by Joel Hellman and Daniel Kaufmann, Finance and Development, IMF magazine, Vol. 38, No. 3 (2001).

mandate of coordination and policy proposals' formulation, has so far met only once and its further mandate and practical efficiency may not yet be estimated.

18. To sum-up the system is still not fully operational. Moreover, given the number of bodies a conflict of competences may arise even though some of interlocutors affirmed that the distributions of competences were carefully examined at the legislative stage.

19. One of the cornerstones of the anti-corruption system is the system of electronic assets declarations. An untruthful asset declaration is a criminal offence. However, for the moment this mechanism remains a dead letter given that the National Bureau for the prevention of corruption, which has to approve the form, cannot be constituted. Another recent scandal related to asset declarations concerned an amendment tabled at the latest meeting of the Parliamentary Committee on Budget which proposed that the system of electronic asset declaration not be introduced before the 1st January of 2017. Even though the "hidden" amendment had been discovered and removed from the draft law, the text adopted on 16 February 2016 contained a set of last minute amendments which weakened the initial wording and therefore attracted several critics.¹⁶

4. Some developments which took place in Ukraine after the visit

20. The current Ukrainian government was supposed to address rising calls from the public to root out corruption while ensuring that such a campaign does not lead to instability. In this context, the stepping down of several leading reformers, such as the Minister for Economic Development and Trade, Mr Abromavičius, and several members of his team announced in the beginning of February 2016 thrust Ukraine into a new political crisis. He accused several officials of corruption and attempts to obstruct the reforms. In particular, Mr Igor Kononenko, a businessman and a member of parliament from the Poroshenko Bloc party, was openly accused of attempting to install cronies in the management of several State companies and a deputy economy minister in charge of Naftogaz. Even though Mr Abromavičius reintegrated the government after a conversation with Mr Poroshenko the scandal showed that Ukraine "still has a big problem with the influence of big business on the economy and government."¹⁷

21. In addition, another important pillar of anti-corruption reforms – the Prosecutor General Office - was recently hit. On 15 February 2016, the Deputy Prosecutor General Mr Kasko, a long-standing partner of the Council of Europe, resigned over corruption and the cover-up of the top officials of the prosecutor's office.¹⁸ The next day, the Chief Prosecutor Mr Shokin resigned after several months of pressure by the civil society.

22. To conclude, efficient fight against corruption in Ukraine, as indeed anywhere else, goes hand in hand with State building capacities which would enable the system to reach control over the making of policies and their implementation. A successful reform of the judiciary would be a crucial step as well as the setting up of a clean and trustworthy administration. Concerning more specific anti-corruption policies, they have to maintain their systemic character rather than a situation-specific or a merely repressive character in which efforts are directed to sorting out a given problem and are triggered by internal or external pressure.

23. Citizenship education is also crucial. The current generation of policymakers in Ukraine needs to understand and act on the urgent need to promote a new culture based on a strong sense of integrity and respect for the rule of law within Ukrainian society. Targeted educational projects should aim at raising young people's awareness of both corruption and the way it seeps into the economy, public administration and politics, and how to fight against it. These measures should not only target students or youth but also all professionals involved in the fight against corruption, including through international exchanges or study visits, as part of a broader effort to improve governance. The report on *Youth against corruption*, which is being prepared by the Committee on Culture, Science, Education and Media, will therefore be complementary to my report.

24. Despite the many issues identified during my visit, and above all the need for an effective implementation of the legislation and better functioning of the democratic institutions, I was also able to appreciate the legislative and institutional efforts that the country has made over the past two years, and I can only encourage the authorities to continue undertaking the difficult but necessary task of fighting corruption at all levels of society.

¹⁶ In particular, it was described by the EU representative to Ukraine as not being "in line with anti-corruption commitments undertaken by the Ukrainian leadership", <https://www.facebook.com/EUDelegationUkraine/photos/a.145962402115063.26057.126879227356714/1074356935942267/?type=1&theater>.

¹⁷ The process of restoring the state capacity is referred to by some journalists as «deoligarchisation ».

¹⁸ <http://www.unian.info/politics/1265039-kasko-corruption-cover-up-reign-in-pgo.html>.

Programme of the fact-finding visit by Mr Michele Nicoletti (Italy, SOC)

Kyiv, Ukraine
19-20 January 2016

Tuesday 19 January 2016

- 08:00 – 09:00 Working breakfast with Ambassador Vladimir Ristovski, Head of the Council of Europe Office in Kyiv
- 09:00 – 10:30 Meeting with:
- Mr Igor Koliushko, member of the Reanimation Reforms Package (RPR) Council
 - Mr Denis Bigus, special correspondent at ZIK channel, independent blogger
- 10:30 – 11:30 Meeting with International Organisations
- Mr Berend de Groot, Head of Cooperation, EU Delegation
 - Mr Andriy Khuharuk, Project Manager, OECD
 - Mr Jan Thomas Hiemstra, UN Resident Country Director in Ukraine, UNDP
 - Mr E. Jed Barton, Mission Director for Ukraine, Moldova, and Belarus, USAID
- 13:00 Lunch with representatives of political fractions, members of the Parliamentary Committee on Foreign Affairs
- 16:00 – 17:00 Meeting with Mr Yeleesev, Deputy Head of the Presidential Administration
- 17:15 – 18:00 Meeting with Mr Pavlo Klimkin, Minister of Foreign Affairs
- 18:15 – 19:00 Meeting with Mr Yehor Sobolev, Head of the Parliamentary Committee on the fight against corruption
- 20:00 Dinner hosted by Ambassador Fabrizio Romano, Embassy of Italy in Ukraine, with representatives of the International Community,
- with the participation of:
- Ambassador Vladimir Ristovski, Head of the Council of Europe Office in Kyiv
 - Ambassador Jan Tombinski, EU Delegation in Ukraine
 - Ambassador Jeffrey R. Pyatt, US Embassy in Ukraine
 - Ambassador Jon Elvedal Fredriksen, Embassy of Norway in Ukraine
 - Ambassador Christian Dons Christensen, Embassy of Denmark in Ukraine

Wednesday 20 January 2016

- 15:00 – 16:00 Meeting with representatives of the National Agency for Prevention of Corruption (NAPC) Ms Natalia Korchak, Mr Viktor Chumak and Mr Oleksandre Skopych
- 17:00 Press conference